In the

Supreme Court of The United States

OCTOBER TERM, 1972

No. 72-1490

FEDERAL POWER COMMISSION,
Petitioner,

v.

TEXACO, INC., et al.,
Respondents.

No. 72-1491

DUDLEY T. DOUGHERTY, et al., Co-Executors of the ESTATE OF MRS. JAMES R. DOUGHERTY, et al.,
Petitioners,

v.

TEXACO, INC., et al.,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENT JAMES M. FORGOTSON, SR.

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PRELIMINARY STATEMENT

James M. Forgotson, Sr. is an independent producer of natural gas with production of natural gas in Louisiana and Texas. James M. Forgotson, Sr., a petitioner in the

court below, opposes the petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia circuit in the above-described proceedings.[1]

QUESTIONS PRESENTED

Does the Federal Power Commission (FPC or Commission) have authority to exempt small producers from direct rate regulation and some other provisions of the Natural Gas Act by shifting the burden of establishing the justness and reasonableness of rates for interstate wholesale sales of natural gas from the seller (small producers) to the purchasers (interstate pipelines or large producers who buy natural gas from small producers for subsequent re-sale to interstate pipelines) despite clear statutory language to the contrary? If there is statutory authority for the above described scheme of indirect regulation does *any* price control scheme limited to just one energy source which is not unique constitute such invidious discrimination that it is abhorrent to the Fifth Amendment of the Constitution of the United States?

STATEMENT

A. Proceedings Before the Commission.

On July 23, 1970, the Federal Power Commission issued, in Docket No. R-393, a Notice of Proposed Rule-

[1] Reference is made herein solely to the petition of the Federal Power Commission, No. 72-1490, inasmuch as Dougherty, et al., No. 72-1491, does not raise any significant points not already covered by FPC.

making entitled "Exemption of Small Producers from Regulation" (R. 1-13). In essence, the Commission proposed to exempt small producers[2] from rate regulation under the Natural Gas Act, permitting them to collect contractually-negotiated prices for gas sold in interstate commerce for resale. The Commission undertook to assure small producers that their contract price would not be subject to change by the FPC and, therefore, they would no longer be subject to refund obligations. The Commission's stated purpose was to stimulate additional exploratory efforts and dedication of gas reserves to the interstate market in order to augment dwindling supplies. Its principle asserted authority for such was its classification powers under Section 16 of the Natural Gas Act (the Act).

The Commission did not propose to free small producers from all regulation under the Act, however, announcing that it would retain abandonment authority over small producers' sales pursuant to Section 7(b) of the Act, 15 U.S.C. 717f(b), as well as requiring certain annual reports. Further, the Commission proposed to allow pipelines to file "tracking" rate increases[3] to recover increases in their purchased gas costs which were anticipated as a result of exempting small producers from rate regulation.

After receiving comments from various parties, the

[2] "Small producers" are those producers selling 10,000,000 Mcf or less of natural gas in interstate commerce for resale annually.

[3] "Tracking" rate increases authorized by the FPC are similar in concept to the more familiar "fuel adjustment" clauses.

Commission issued Order No. 428 entitled, "Order Establishing Blanket Certificate Procedure for Small Producer Sales and Providing Relief from Detailed Filing Requirements" (FPC Pet., pp. 29a-46a).[4] The Order, in general, followed the proposal indicated by the Commission's Notice of July 23, 1970, with respect to exempting small producers from rate regulation but, for the first time, the Commission indicated that the pipelines' right to "track" increases in purchased gas costs would be limited to that portion of the contract prices paid to small producers which the Commission, in later proceedings, found justifiable. The essence of the newly-announced *indirect* scheme of small producer rate regulation is set forth in the following excerpts:

> "The action taken here in our view does not constitute deregulation of sales by small producers. We will continue to regulate such sales but will do so at the pipeline level by reviewing the purchased gas costs of each pipeline with respect to small producers' sales." (FPC Pet., p. 32a).
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> "Any question as to the propriety of the price paid by a pipeline to a small producer will be subject to review in certificate and rate cases involving that pipeline to make sure it is justified. The Commission has ample authority to inquire in these cases into the reasonableness of all items of operating expense, including the cost of purchased gas and to disallow

[4] Reference "FPC Pet." is to the Commission's Petition for Writ of Certiorari in No. 72-1490.

items of cost which are imprudent." (FPC Pet., p. 33a).

* * *

"Small producers will have no refund obligations with respect to increased rates . . . However, the pipeline's rates will be subject to reduction and refund, with respect to new small producer sales, but only as to that part of the rate which is unreasonably high considering appropriate comparisons with highest contract prices for sales by large producers or the prevailing market price for intrastate sales in the same producing area." (FPC Pet., p. 37a).

On July 15, 1971, the Commission issued Order No. 428-B (FPC Pet., pp. 50a-84a), which modified Order No. 428 in certain respects not at issue herein but reasserted the Commission's authority to engage in the unprecedented scheme of so-called indirect small producer rate regulation at the pipeline level.

B. The Decision Below

The court of appeals, with one judge dissenting, set aside the Commission's action exempting small producers from rate regulation after concluding that such action exceeded the Commission's authority under the Natural Gas Act (FPC Pet., pp. 3a-22a).

The court's decision turned upon an analysis of specific provisions of the Natural Gas Act, namely, Sections 4, 5, 7 and 16 (FPC Pet., pp. 85a-93a). The court concluded, in effect, that the regulation of rates for jurisdictional sales

was *mandatory*, and not discretionary or permissive, regardless of the size of the regulated entity. In that connection, the Commission's Section 16 classification powers would not permit the exemption of small producers from rate regulation under Section 4 of the Act (FPC Pet., pp. 7a-10a). That being the case, the court held that the Commission's Order Nos. 428 and 428-B represented a clear-cut abdication of statutory duty to assure that *all* regulated rates, including those of small producers, be "just and reasonable" (FPC Pet., pp. 10a-16a). This departure from statutory duty and standards through the so-called "indirect" mode of regulation at the pipeline level was held to be contrary to the provisions of the Natural Gas Act:

> "Nothing at all insures that those levels (of rates allowed to be passed on to consumers) will be 'just' or 'reasonable.' That is the essential flaw in the Commission's plan. That is the point at which the FPC abdicates its regulatory responsibility in derogation of the purposes and mandatory terms of the statute. Indirect 'regulation' by such novel 'standards' is worse than an exemption simpliciter. Such an approach retains the false illusion that a government agency is keeping watch over rates, pursuant to the statute's mandate, when it is in fact doing no such thing." (FPC Pet., pp. 12a-13a).

REASONS FOR DENYING THE WRITS

As will be shown below, the writs should be denied because: (1) the decision below is clearly correct as a

matter of statutory interpretation, (2) the decision below is clearly correct as a matter of constitutional law even if the court below erred in statutory interpretation in reaching its decision, and (3) there is no conflict of decisions to be resolved. The arguments of Independent Natural Gas Association of America (INGAA) dealing with the correctness of the decision below as a matter of statutory interpretation and absence of conflicts to be resolved presented in its brief in opposition (INGAA Brief In Opposition pp. 6-17) are correct and substantially complete and will not be repeated here. The only argument to be presented here is the Constitutional Argument.

A. The decision below is clearly correct as a matter of Constitutional Law even if the Court erred in statutory interpretation in reaching its decision.

When technologies and other circumstances change by reason of later events, statutes, including judicial interpretations of them, which were once Constitutional can become unconstitutional. *Abie State Bank v. Bryan (Weaver)* 282 U.S. 765 (1931). It is the contention of Respondent Forgotson that because of changes in science and technology, natural gas itself is not a unique fuel or energy source. It merely is an energy yielding commodity which when consumed produces a given amount of energy per unit of mass or volume. There is nothing unique about the production, shipment and storage of natural gas. There is no economic, technological, administrative or other valid reason for classifying natural gas and *any* independent producers

thereof to justify imposition of price controls and other public utility regulations of independent field producers. These producers are not public utilities. What has happened has been the creation of a closed class of field producers of other fossil and nuclear fuels plus producers of synthetic molecules of natural gas from coal, who are not subject to public utility regulation. The creation of a closed class constitutes invidious discrimination, *Morey v. Doud,* 354 U.S. 457 (1957). This discrimination is invalid under the due process clause of the Fifth Amendment of the Federal Constitution which incorporates the provisions of the Equal Protection Clause of the Fourteenth Amendment. *Brown v. Board of Education of Topeka,* 349 U.S. 294 (1955).

In addition there is a less restrictive alternative to dealing with potential monopolistic abuses by independent natural gas producers, namely vigorous enforcement of anti-trust laws. Consequently, the present over-all regulatory scheme should be constitutionally defective. See Streuve, *"The Less Restrictive Alternative Principle and Economic Due Process".* 80 Harv. L. Rev. 1463 (1967). See also, Areeda, *Antitrust Analysis* (1st ed. 1967).

Respondent Forgotson contends that the classification of independent producers as "natural gas companies" under the Natural Gas Act in *Phillips Petroleum Co. v. Wisconsin,* 347 U.S. 672 (1954), making said producers subject to public utility regulation by the FPC is no

longer justifiable constitutionally; therefore all regulation under the Act of independent producers, whether large or small, is unconstitutional and Orders 428 and 428-B must be invalidated.

CONCLUSION

The petitions for Writ of Certiorari should be denied.

Respectfully submitted,

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